United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7320

TO BE ARGUED BY
BRIAN D. STARER

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket # 76-7320

GUNTER E. BIELEFELD,

Plaintiff-Appellant,

-against-

WALLENIUSREDERIERNA and KARL GEUTHER & CO.,

Defendants-Appellees.

On Appeal From the United States District Court for the Southern District of New York

---

BRIEF FOR APPELLEES WALLENIUSEDERIERNA & KARL GEUTHER & CO.

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Appellees
One State Street Plaza
New York, New York 10004

M. E. DeORCHIS
BRIAN D. STARER
RONALD W. BJELLAND

Of Counsel

TO BE ARGUED BY
BRIAN D. STARER

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket # 76-7320

GUNTER E. BIELEFELD,

Plaintiff-Appellant,

-against-

WALLENIUSREDERIERNA and KARL GEUTHER & CO.,

Defendants-Appellees.

On Appeal From the United States District Court for the Southern District of New York

---

BRIEF FOR APPELLEES WALLENIUSREDERIERNA & KARL GEUTHER & CO.

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Appellees
One State Street Plaza
New York, New York 10004

M. E. DeORCHIS

BRIAN D. STARER

RONALD W. BJELLAND

Of Counsel

INDEX

CITATIONS

STATUTES

MISCELLANEOUS

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket # 76-7320

GUNTER E. BIELEFELD,

APPELLANT,

-against-

WALLENIUSREDERIERNA and KARL GEUTHER & CO.,

APPELLEES.

On Appeal From the United States District Court for the Southern District of New York

---

BRIEF FOR APPELLEES WALLENIUSREDERIERNA & KARL GEUTHER & Co.

PRELIMINARY STATEMENT

On June 10, 1976, Judge Henry F. Werker upon motion by Appellees, dismissed Appellant's complaint with prejudice on the grounds of expiration of the applicable

statute of limitations and on forum non conveniens grounds.

Appellant, as successor to a Brazilian ship agency, seeks recovery against Appellees for $22,462.03 representing outstanding accounts alleged to be due and owing since 1963 and $100,000 for punitive damages for alleged "fraud" in connection with the collection of those accounts. Appellees are foreign corporations and the transactions which are the basis for this dispute involved no contacts with the United States.

After literally years and years of unsuccessful attempts both in Brazil and in Europe, to establish his right to the sums claimed to be outstanding, Appellant brought this action sounding in fraud to circumvent the expired statute of limitations for contract actions.

QUESTIONS PRESENTED

1. Whether the Court abused its discretion in dismissing Appellant's Complaint on forum non conveniens grounds.

2. Whether the contract or "fraud" limitation period is applicable to the facts of this case and

whether the applicable period had expired prior to the commencement of this suit.

STATUTE INVOLVED

New York CPLR §213 provides in pertinent part:

> "The following actions must be commenced within six years:
>
> * * *
>
> (2) an action upon a contractual obligation or liability express or implied, . . .
>
> * * *
>
> (8) an action based upon fraud; the time within which the action must be commenced shall be computed from the time the plaintiff or the person under whom he claims discovered the fraud, or could with reasonable diligence have discovered it."

New York CPLR §203 provides in pertinent part:

> "(f) . . . where the time within which an action must be commenced is computed from the time when facts were discovered or from the time when facts could with reasonable diligence have been discovered, or from either of such times, the action must be commenced within two years (Emphasis added) after such actual or imputed discovery or within the period otherwise provided, com-

puted from the time the cause of action accrued, whichever is longer."

New York CPLR §206 provides in pertinent part:

"(d) In an action based upon a mutual, open and current account, where there have been reciprocal demands between the parties, the time within which the action must be commenced shall be computed from the time of the last transaction in the account on either side."

STATEMENT OF FACTS

The Appellant failed to submit a proposed appendix to the Appellee. Moreover, Appellant's "Appendix" consists of documents not before the District Court and consequently not in the record on appeal. Appellees' Appendix consists of documents submitted by the Appellant in the District Court and references herein are to page numbers in that Appendix.

The following facts may be summarized from the above documents:

Defendant-Appellee Walleniusrederierna (hereinafter referred to as Wallenius) was and is a

Swedish Corporation engaged in the ownership, chartering and operation of merchant vessels. Appellee Geuther & Co., was and is the general agent in Germany for Wallenius and managing owners of the Wallenius' German fleet.

Geuther was also the general agent in Europe for Companhia Brasileira de Navegaco Intercontinental (hereinafter referred to as CBNI), a Brazilian steamship liner service.

CBNI was the time-charterer with the right to discharge and load cargo in Brazilian ports and operated a liner service between Brazil and Europe. They had their office in Brazil and nominated all agents in Brazil directly. In Europe, such functions were handled by Geuther.

In 1962, Bielefeld & Cia. Ltd., was nominated by CBNI as "General Agent" for Brazil. (Exhibit A; 14a) Bielefeld & Cia. Ltd., was a partnership organized under the laws of Brazil with its principal place of business in Sao Paulo, Brazil. (Exhibit B; 18a) The amendment to the partnership contract, dated September 15, 1961, notes that Mr. Bielefeld was a Brazilian citizen by naturalization. (Exhibit B; 20a)

Bielefeld & Cia. Ltd., was reimbursed directly from CBNI for port dues, agency commissions and other costs accruing in connection with the liner service. (Exhibit C; 27a)

Geuther reimbursed Bielefeld for any outlays on behalf of the owners of the vessels, such as cash to the Captain, provisions, etc., against original and signed vouchers. (Exhibit D; 29a) Freight commissions earned by Bielefeld were billed and paid by CBNI. (Exhibit C, E; 27a, 32a)

Wallenius received from time to time statements of accounts, covering owners' expenses from Geuther, who was authorized to settle owners' disbursement costs on Wallenius' behalf. However, CBNI had the responsibility and obligation to check and pay all freight commissions to agents including Bielefeld & Cia Ltd. Indeed, as noted above, freight commissions earned by agents were billed to CBNI.

During the one year period in which Bielefeld & Cia. Ltd., functioned as general agent in Brazil, statements of current accounts were periodically prepared by both Geuther and Bielefeld. Geuther on request

remitted funds to Bielefeld for reimbursement of advances made by the Brazilian Agency. (Exhibits F-M; 33-41a) On request, Geuther advanced funds to Bielefeld for subsequent disbursements and were shown as credits on Bielefeld's statements. (Exhibits F, G; 33a, 34a)

CBNI dispensed with Bielefeld's services on December 1, 1962, terminating the agency relationship. (Exhibit N-1; 44a) Subsequent statements of accounts were presented by Bielefeld on outstanding debts owing or thought to be owing at the conclusion of the agency relationship.

On November 10, 1964, Appellee Geuther prepared a final statement of accounts which showed a balance of $891.21 in Bielefeld's favor. (Exhibit M; 41a) A November 20, 1964 statement of account was the last received by Geuther from Bielefeld and showed a balance of $5,764.14 in Appellant's favor. (Exhibit N, O; 42a, 45a) Geuther responded to Messrs. Bielefeld's statement of accounts on November 28, 1964, refuting the figures and correcting the balance to $891.21. (Exhibit P; 46a)

The dispute concerning this final accounting was to continue for the next 14 years. (Exhibits Q, R; 47a, 50a)

Geuther spent considerable time in Brazil in 1963 balancing the accounts between CBNI and Bielefeld, and Bielefeld was informed of the status of those accounts. (Exhibit Q; 47a) However, the controversy continued, and in January 1965, Wallenius' relationship with CBNI terminated. In 1968, CBNI advised Bielefeld that any amounts he felt outstanding must be collected from Wallenius. (Exhibit S; 51a)

Approximately 6 years after the termination of Bielefeld's agency, Appellant addressed a letter on March 18, 1969 to Appellee Geuther concerning the "dispute" in accounts. (Exhibit E; 31a) Geuther advised Appellant that their books had been long closed on this matter.

Nevertheless, in good faith and notwithstanding the fact that the statute of limitations had run with respect to these claims, in August/September of 1971, Appellee Geuther, through their German attorneys, Dr. Schackow and Partners, concluded a settlement with respect to the claims with Appellant's German attorney Heiko Gothwald. (Exhibits T 1-9; 52a-71a) Appellant stated in his letter of July 2, 1971 (Exhibit U; 73a) that:

> " I am prepared to give you a receipt for the US $1,232.80 in liquidation of all claims with the exception of the $4,000."

A letter dated June 24, 1971 from Mr. Bielefeld to Geuther states as follows:

> "Whereas I understand this claim is prescribed and assume I have no more legal rights, I am sure you have no intention of approaching this matter from that angle.
>
> Apart from the Disbursement Accounts covered by aforementioned $4000 there are other Disbursement Accounts that had been rendered by my former branches at those two ports. There are also freight commissions which had been computed in Sao Paulo in compliance with instructions from your Office in Bremen. Now, in this regard, I am sure we may come to some compromise and I would gladly receive <u>any</u> acceptable proposal from you.
>
> If you so desire, a lumpsum settlement may have reference to no specific items debated in the past. Instead, all differences that ever existed shall be eliminated. Perhaps you would already prepare the wording for the mutual release and let me have it for my perusal." (Exhibit V; 74a)

On September 16, 1971, Geuther's attorney, Dr. Kohler of Dr. Schackow and Partner, sent a check in the amount of $1,232.80 to the Appellant's attorney, Mr. Wolper, and considered the matter settled completely.

(Exhibit T-9; 72a)

In spite of the release and the lapse of over 14 years since the transactions which form the basis for Bielefeld's demands, Bielefeld has continued to this day to seek recovery for alleged outstanding accounts.

On May 1, 1975, (Complaint 2a, 3a) more than 12 years after the termination of his agency, Bielefeld commenced the instant action as "successor" to Bielefeld & Cia. Ltd. Bielefeld seeks recovery of the alleged outstanding accounts which date back to 1962 and 1963. (Complaint 2a) The Complaint, however, alleges fraud, for the purported concealment of the "existence of the Plaintiff's Invoices," for which $100,000.00 in punitive damages is sought.

Upon motion by Appellees, Judge Werker on June 10, 1976, dismissed Appellant-Bielefeld's Complaint with prejudice, for substantial forum non conveniens reasons and in light of the expiration of the New York Statute of Limitations for contractual claims. CPLR 213 (2) (McKinney(1972)) (Opinion 11a, 12a) Judge Werker noted in his opinion at page 4 that the documents relied

upon by Appellant Bielefeld do not reveal any fraudulent concealment of invoices by the Appellees. Consequently, the Statute of Limitations for fraud was held inapplicable. (Opinion 12a)

ARGUMENT

Appellant's Complaint was properly dismissed, with prejudice, for forum non conveniens reasons and by reason of the expiration of the applicable Statute of Limitations.

The decision of the Court below dismissing Appellant's Complaint with prejudice was based on the substantial documentation and correspondence produced by Appellant which revealed his relentless harassment of Appellees around the world for many years concerning transactions which had virtually no contacts in the United States. Moreover, this same documentation inequivocally substantiated Appellees' claim that the matter had been time-barred for many years.

A. The Forum Chosen By Appellant Is So Oppressive As To Be Out Of All Proportion To Appellant's Convenience.

A motion to dismiss for forum non conveniens is addressed to the discretion of the Court, and seeks a dismissal on the grounds that "the plaintiff may not by choice of an inconvenient forum, 'vex', 'harass' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy." Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947); Papers Op. Consult. Int. Ltd. v. SS Hong Kong Amber, 513 F. 2d 667 (9th Cir., 1975); Hoffman v. Goberman, 420 F. 2d 423 (3rd Cir., 1970); Noto v. Cia Secula di Armanento, 310 F. Supp. 639 (SDNY 1970); See also, C. Wright, Law of Federal Courts, 2d Ed. at 164-65.

An action may be properly dismissed under the doctrine of forum non conveniens when the convenience of the parties and the ends of justice weigh heavily against the retention of jurisdiction. Gulf Oil Corp. v. Gilbert, supra at 507-8; Vanity Fair Mills v. T. Eaton Co., 234 F. 2d 633, 645-6 (2 Cir.) cert. denied 352 U.S. 871 (1956); Fitzgerald v. Texaco, Inc., 521 F. 2d 448 (2d Cir. 1975), cert. denied 96 S. Ct. 781.

Factors bearing on the convenience of parties are ease of accessibility to sources of proof, the availability of compulsory process and the cost of obtaining willing witnesses. See Gulf Oil Corp. v. Gilbert, supra at p. 508, Fitzgerald v. Westland Marine Corp., 369 F. 2d 499, 501 (2nd Cir., 1966).

There is no evidence that any of the transactions concerned in this action occurred in the United States. Appellant's involvement stems entirely from his ownership or operation of a steamship agency in Sao Paulo, Brazil in the early 1960's. Appellees have their principal places of business in Europe and did not operate any of the vessels involved for their own accounts. The vessels were all time-chartered to CBNI, a Brazilian corporation. The Appellee corporations are not registered to do business in this state nor do they maintain offices within this state. There are no contacts with respect to this case in this jurisdiction other than the fact that Appellant recently took up residence in New York in 1974, more than 12 years after the subject transactions. Consequently, any witnesses to these transactions are

located either in Brazil or Germany. Moreover, Appellant in 1971 settled the subject claims with Appellee Geuther in Germany and failed in a Court action against CBNI in Brazil to retain certain freight commissions. (Exhibit S; 51a) The effect of the settlement and prior suit on the instant claim would best be determined by suit in either Germany or Brazil. The convenience of Appellant will not be seriously affected by a dismissal. He has not hesitated in the past to pursue the matter in Europe as evidenced by his trip to Europe in 1973 for the explicit purpose of reviewing the subject accounts (Exhibit W; 75a) as well as his retention of German attorneys to pursue his claim. (Exhibit T-1; 54a)

Federal Courts are not hesitant to dismiss under the doctrine where contacts with the United States are insufficient. See, for example, Transomnia G.m.b.h. v. M/S Toryu, 311 F. Supp. 751, 1970 AMC 1686; Iberian Tankers Company v. Terminales Maracaibo, C.A., 322 F. Supp. 73 (SDNY 1971); Noto v. Cia Secula di Armanento, supra.

Although the amount of pre-trial discovery may be a consideration when weighing convenience, the discovery to date has been minimal and would be far outweighed by the cost involved in further discovery in this forum. See Transomnia G.m.b.h. v. M/S Toryu, supra.

Foreign law will be applied to determine the rights of the parties, (See Romero v. International Terminal Operating Co., 358 U.S. 354, 382-383, 79 S. Ct. 468, 3 L. Ed. 368 (1959); Lauritzen v. Larsen, 345 U.S. 571, 582, 73 S. Ct. 921, 97 L. Ed. 1254 (1953), Restatement, Second, Conflict of Laws §346a (Tent. Draft No. 6, 1960).

> "a highly relevant factor to be considered when determining convenience."

Transomnia G.m.b.h. v. M/S Toryu, supra at p. 1688.

Neither New York nor Federal decisional law requires maintenance of the action in this jurisdiction by reason of Appellant's residence. Olympic Corp. v. Societe Generale, 462 F. 2d 376, 378 (2nd Cir., 1972). The plaintiff's residence is only one of the factors to

considered. Silver v. Great American Insurance Co., 29 N.Y. 2d 356, 278 N.E. 2d 619.

An American citizen, even one suing in his own right, does not have an absolute right under all circumstances to sue in an American Court. Vanity Fair Mills v. T. Eaton Co., supra, at p. 645; Hoffman v. Goberman, supra, at p. 428; John Fabick Tractor Co. v. Penelope Shipping Co., 278 F. Supp. 182, 183 (SDNY 1967). Manifest injustice to the Appellees will result by the retention of jurisdiction in this forum.

Less weight is given to a plaintiff's American citizenship in determining forum non conveniens where that plaintiff sues in a derivitive capacity such as an assignee. United States M. & S. Ins. Co., v. A/S Den Norske A. Og A. Line, 65 F. 2d 393 (2nd Cir., 1933); Cerro De Pasco Copper Corp. v. Knut Knutsen, 94 F. Supp. 60 aff'd 187 F. 2d 990 (2nd Cir. 1951). Appellant-Bielefeld brought suit here as "successor" to the Brazilian company, Bielefeld & Cia. Ltd. That company was organized under the laws of Brazil and had its principal place of business in Sao Paulo Brazil (Exhibit B; 18a) In a frail

attempt to develop United States contacts Appellant, in his brief on appeal at page 2 claims that a New York bank account was utilized for the transfer of funds between Appellee Geuther and Appellant. The supporting documentation, not before the District Court, refers only to a single transaction. Statements of account between Geuther and Bielefeld & Cia. Ltd., during the period in question establish that payments were made into Appellant's account in the Bremer Bank, Bremen, Germany. (Exhibit X; 76a) Moreover, even for jurisdictional purposes, the mere maintenance of a bank account in New York City for the receipt of funds related to the transaction in dispute, is insufficient to satisfy the "corporate presence" test under New York law. Masonite Corp. v. Hellenic Lines, Ltd., 1976 AMC 319 (SDNY, January 6, 1976) (not yet officially reported).

Appellant has settled all claims against Appellee Geuther and failed in a Court action in Brazil against CBNI to retain certain freight commissions, although as indicated in his letter of March 18, 1969, CBNI was the proper party from whom to seek payment.

(Exhibit E; 31a) Consequently, an argument that neither of the Appellees is amenable to process in an obviously more convenient foreign forum (Germany or Brazil) or that they have not agreed to submit to such foreign jurisdiction or have not agreed to waive the statute of limitations should have no bearing in the determination of the instant motion. The Court in Noto v. Cia Secula di Armanento, supra, explained as follows:

> ". . . plaintiffs contend that dismissal of these suits is foreclosed, since the doctrine of forum non conveniens 'presupposes at least two forums in which the defendant is amenable to process; [it] furnishes criteria for choice between them.' They argue that none of the defendants here is amenable to process in an obviously more convenient foreign forum; nor has any defendant agreed to submit to such foreign jurisdiction. In sum, plaintiffs contend that upon this ground alone the Court is without discretion in the matter and lacks power to decline to entertain jurisdiction. This Court does not agree."
>
> * * *
>
> "The Court does not act in a vacuum, but upon a realistic appraisal of facts in exercising its discretion. It is true that in Gulf Oil Corp. v. Gilbert and its progeny and pre-

> decessors the Supreme Court reviewed cases where the courts had exercised discretion in accepting or declining jurisdiction where defendants were subject to process and jurisdiction in other forums, but it is also clear that the discretion was exercised with respect to defendants against whom upon its face a meritorious claim was alleged. The cases did not involve defendants against whom, as in this instance, palpably specious and legally baseless claims are asserted."
>
> "Inquiry by the Court as to the integrity of the alleged claims is not foreclosed . . . "

The Court went on to state that:

> "The plaintiff's asserted claims have no relationship to or contact with this district, or for that matter with any jurisdiction in the United States. - The doctrine of forum non conveniens protects not only the immediate defendant from harassing and vexatious litigation, but also other litigants and the community at large from unwarranted imposition upon the local courts' jurisdiction."

Noto v. Cia Secula di Armanento, supra, at p. 648, 649.

The decision whether to invoke the doctrine of forum non conveniens rests in the sound discretion of the Trial Court. Therefore, a decision by the District Court to dismiss on this ground may only be

reversed if it constitutes an abuse of that discretion. Fitzgerald v. Texaco, Inc., supra, at p. 451. "It is not the role of the appellate court to determine how it would have exercised its jurisdiction had the facts been presented to it." Papers Op. Consult. Int. Ltd. v. SS Kong Amber, supra, at p. 670.

B. The Statute Of Limitations For Appellant's Cause Of Action Expired Prior To The Commencement Of This Suit.

Federal Courts exercising jurisdiction based on diversity of citizenship must apply the applicable statute of limitations of the state in which it is sitting. Guaranty Trust Company v. York, 326 U.S. 99, 65 S. Ct. 1464 (1945). Restatement, Second, Conflict of Law §142. The applicable statute of limitations is contained in New York CPLR Section 213(2) (MCKinney 1972):

> "The following actions must be commenced within six years:
>
> * * *
>
> (2) an action upon a contractual obligation or liability express or implied, . . ."

See Klein v. Bower, 421 F. 2d 338, (2nd Cir., 1970).

The time from which the statute of limitation is computed is contained in N.Y. CPLR 206(d):

> "In an action based upon a mutual open and current account, where there have been reciprocal demands between the parties, the time within which the action must be commenced

> shall be computed from the time of the last transaction in the account on either side. (Emphasis added).

Appellant bases his cause of action on fraud for the alleged concealment by Appellees of certain invoices and vouchers. He states in his brief on appeal at page 5 that the right to a cause of action lies in the ability to prove a claim. This is a gross misconception by the Appellant.

The last transactions in the disputed accounts occurred in 1963, more than 13 years ago. On November 10, 1964, Appellee Geuther prepared a statement of account which showed a balance of $891.21 in Bielefeld's favor. (Exhibit M; 41a) A November 20, 1964 statement of account (Exhibit O; 45a) was the last received by Geuther from Bielefeld and showed a balance of $5,764.14 in Appellant's favor. He in fact addressed a letter on November 20th, 1964 to Geuther concerning the discrepancy. (Exhibit N; 42a) It consequently cannot be said that the purported debt or cause of action was concealed by the Appellees. When on November 28, 1964, Geuther forwarded to Appellant a statement of account showing a total of only

$891.21 in Appellant's favor, his right to a cause of action was complete and any applicable statute of limitations commenced running. New York CPLR §206 provides in pertinent part:

> "(d) In an action based upon a mutual, open and current account, where there have been reciprocal demands between the parties, the time within which the action must be commenced shall be computed from the time of the last transaction in the account on either side."

New York CPLR 203(a) provides that the statute of limitations on any cause of action begins to run the moment the cause of action accrues; and it accrues "when the plaintiff first became enabled to maintain the particular action in question." Cary v. Koerner, 200 N.Y. 253, 2[illegible], 93 N.E. 979, 982 (1910).

Appellant has admitted that the accounts in this action allegedly became outstanding over 12 years prior to the commencement of this action. (See Complaint; 2a) If Appellant indeed advanced monies which became accounts due, any fraud on Appellees' part could not have been able to conceal the indebtedness. It could only have been possible through poor record

and bookkeeping procedures by the Appellant. (Exhibit Y; 78a)

The explanation by the Appellant, that the invoices and vouchers "disappeared from Bielefeld's offices before they could be recorded in Bielefeld's books," is insufficient. Why should the consequences of their "disappearance" now fall upon Appellees, some 14 years later?

The gravamen of this action is contract and the applicable statute of limitations may not be circumvented by the mere allegation of fraud. The nature of the liability controls the statute of limitations. See Brick v. Cohn-Hall-Marx Co., 276 N.Y. 259, 11 N.E. 2d 902 (1937). See also, Cook v. Schmidt, 254 App. Div. 830, 5 N.Y.S. 2d 34 (1st Dept. 1938); Drydock Knitting Mills, Inc. v. Queen Mach. Corp., 254 App. Div. 568, 569, 2 N.Y.S. 2d 717, 718 (2d Dept. 1938); Pocono Forestry Corp. v. Price, 273 App. Div. 812, 813, 75 N.Y.S. 2d 735 (2d Dept. 1948).

In determining that gravamen of the complaint was not in fraud the Court in Hearn 45 St. Corp. v. Jano, 283 N.Y. 139, 143, 27 N.E. 2d 814 (1940) stated

as follows"

> "The plaintiff's right is complete without reference to the quality or the character of the individual defendants."

If there was fraud in the instant case how does it relate to Appellant's right to payment? The fraud if it exists is only incidental to Appellant's rights which must be based upon contract. The "fraud" which Appellant alleges is that Appellees concealed the existence of certain invoices "for the purpose of not paying them to Appellant." He alleges that the fraud was revealed in a May 10, 1973 letter addressed to Appellant from Wallenius which merely stated that all outstanding accounts between Wallenius and Geuther had been paid to Geuther. (Exhibit Z; 81a) No mention was made of "missing invoices and vouchers." But where is the fraud? If he was unaware of the accounts, why had he been pursuing the matter since 1963? The discovery rule wherein the statute of limitations does not begin to run until discovery of the "fraud" applies only to cases of actual fraud, <u>where a person's very right to a cause of action has been concealed by the fraudulent act on which he bases his cause of action</u>.

Here, at the moment the amount due on the accounts in question was in dispute, Appellant's cause of action accrued. He cannot now by alleging fraud revive this dead claim.

Certainly, it cannot be said that the gravamen of the instant cause of action is the right of this Appellant to recover judgment compensating him for injury sustained as a result of fraud. His right, if any, exists only in contract.

Even stretching the imagination to find fraud in this action, Appellant had either 6 years from its accrual or 2 years from the time of discovery or when with reasonable diligence he should have discovered the fraud, whichever is longer, in which to commence an action. New York CPLR 203(F), 213(8) (McKinney 1972). Appellant's cause of action "accrued" upon commission of the alleged fraud. Appellant claims he has been misled since 1963.

In Rickel v. Levy, 370 F. Supp. 751, (EDNY 1974), plaintiff was held to be time-barred where there was no explanation why he could not have discovered the alleged fraud in 1954 when he became seriously suspicious rather than in 1971. Suspicion of only a mere possibility of

fraud was deemed sufficient to find plaintiff should have discovered the fraud in Mittendorf v. J. R. Williston & Beame Inc., 372 F. Supp. 821 (SDNY 1974). See also, Hoff Research & Dev. Lab. Inc. v. Philippine Nat. Bank, 426 F. 2d 1023 (2nd Cir., 1970).

The Complaint in the instant action was served on Appellees on May 13, 1975 more than 2 years after the date of the letter (May 10, 1973) in which Appellant claims the "fraud" was revealed. The fact of the matter is, however, that Appellant was fully aware of the alleged outstanding accounts prior to the so-called revelation of fraud in Wallenius' letter of May 10, 1973. (Exhibit Z; 81a) How else could he have listed the disbursements and commission accounts, the dates thereof and the purported amounts due in his letter of March 18, 1969, six years prior to the commencement of this action? (Exhibit E; 31a, 32a).

In December, 1968, approximately 6 years prior to the commencement of this action, Appellant was advised by CBNI that he must pursue his claim against Appellee-Wallenius. (Exhibit S; 51a) Appellant's

letter of March 18, 1969 to Appellee Geuther lists all the alleged outstanding items which form the basis of this action. (Exhibit E; 31a, 32a) In August 1969, some 6 years prior to this action, Appellant threatened suit against Appellee Geuther for the same claims, and notified Appellee Wallenius that it would hold them accountable, "(o)therwise there remains only the legal court." (Exhibit Z-1, 82a, 83a) In 1970, Appellant authorized a German attorney to pursue the identical claim herein against the Appellee Geuther. (Exhibit T-1; 54a)

With the knowledge of his present claim as noted above, Appellant in 1971 proposed a settlement: "a lumpsum settlement," with "reference to no specific items debated in the past. Instead, all differences that ever existed shall be eliminated." (Exhibit V; 74a) The claims with the exception of a $4,000 claim, were settled with Geuther in 1971. Yet, in October 1971, Bielefeld addressed a letter to Wallenius, asserting a claim against them, "as principals" for the same alleged outstanding accounts. (Exhibit Z-2; 84a)

The equitable doctrine of estoppel to deprive Appellee of the statute of limitations is of no avail to Appellant in this action. The doctrine only applies where Appellant has been induced to refrain from bringing a timely action by fraud, misrepresentation or deception. Robinson v. New York, 24 App. Div. 2d 260 (1st Dept., 1965), 265 N.Y.S. 2d 566. Reliance by Appellant on the false representation is a necessary element, and estoppel has been denied where the basic facts were known to the plaintiffs putting them on inquiry 6 years prior to the running of the statute of limitations. Augstein v. Levy, 3 App. Div. 2d 595 (1st Dept., 1957), 162 N.Y.S. 2d 269 rehearing and appeal denied 3 App. Div. 2nd 990, 163 N.Y.S. 2d 371 aff'd 4 N.Y. 2d 791, 173 N.Y.S. 2d 27, 149 N.E. 2d 528.

Even under the federal equitable tolling doctrine, the New York period of limitations in respect to the commencement of a fraud action is not tolled from the time when plaintiff discovered or could with reasonable diligence have discovered the alleged wrong.

Rickel v. Levy, supra. There has been no agreement or inducement on the part of the Appellees to postponement of suit by the Appellant. No representations or conduct by or on behalf of the Appellees were calculated to mislead the Appellant. Moreover, Appellant has not shown reliance on any of the representations of the Appellees. See Annotations 39 ALR 3rd 127 (1971), 43 ALR 3rd 756 (1972), 44 ALR 3rd 482 (1972). It was Appellant's own attorney who advised him against pursuing the matter. (Exhibit Z-3; 85a)

> "As I have already explained to you in the correspondence, by going to court we could at best expect $891.21. As for all the other amounts the prospects are entirely bad."

CONCLUSION

This matter is long overdue for a final disposition, "as otherwise yet subsequent generations will have to occupy themselves with this affair (Appellant's Exhibit F)." A requirement that Appellees submit to jurisdiction in a foreign court, waiving the statute of limitations, would be a gross injustice to the Appellees. It is respectfully submitted that the order of the District Court be affirmed in all respects and Appellees be awarded costs for this appeal.

Respectfully submitted,

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Appellees
Walleniusrederierna & Karl
Geuther & Co.
One State Street Plaza
New York, New York 10004

M. E. DeORCHIS

BRIAN D. STARER

RONALD W. BJELLAND

Of Counsel

3233-6

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

BENJAMIN NOSTRAMO, being duly sworn, deposes and says; that he is over 21 years of age; that on 10-18-76, he served a true copy of 2 briefs,

by depositing the same, duly enclosed in a postpaid and sealed wrapper, in an official letter box duly maintained and operated by the Government of the United States of America, at One State Street Plaza, Borough of Manhattan, City of New York, and addressed to said Gunter Bielfeld at 111 Broadway NYC, that being the address within the State designated by him on previous papers in this action, as the place where he then kept an office for the regular transaction of business, between which place there then was and now is a regular communication by mail.

Benjamin Nostramo
BENJAMIN NOSTRAMO

Sworn to before me this
18th day of October, 1976

Anne M. Doris
Notary Public

ANNE M. DORIS
Notary Public, State of New York
No. 31-0999575
Qualified in New York County
Term Expires March 30, 1977